Schedule 8 – Expert Determination Agreement

Expert Determination Agreement

[Project]

**[##]**

(**State**)

**[##]**

(**Project Co**)

**[##]**

(**Expert**)

Contents

[Schedule 8 – Expert Determination Agreement 1](#_Toc160799920)

[1. Definitions 3](#_Toc160799921)

[1.1 Project Deed definitions 3](#_Toc160799922)

[1.2 Definitions 3](#_Toc160799923)

[1.3 Interpretation 4](#_Toc160799924)

[2. Appointment of Expert 6](#_Toc160799925)

[3. Confidentiality 6](#_Toc160799926)

[4. Costs and fees 6](#_Toc160799927)

[5. Exclusion of liability and indemnity 7](#_Toc160799928)

[6. Co-operation of the Parties 7](#_Toc160799929)

[7. Governing Law and jurisdiction 7](#_Toc160799930)

[8. Entire agreement 7](#_Toc160799931)

[9. Further acts and documents 7](#_Toc160799932)

[10. Survival of certain provisions 8](#_Toc160799933)

[11. Waiver 8](#_Toc160799934)

[12. Amendments 8](#_Toc160799935)

[13. Expenses 8](#_Toc160799936)

[14. Severance 8](#_Toc160799937)

[15. Counterparts 9](#_Toc160799938)

[Schedule 1 — The Matter 10](#_Toc160799939)

[Schedule 2 — Rules for Expert Determination Process 11](#_Toc160799940)

[Schedule 3 — Schedule of Fees and Disbursements 14](#_Toc160799941)

Expert Determination Agreement made on

**Parties** [*#insert party name and address*](*#insert**party name*)

[*#insert party name and address*](*#insert**party name*)

[*#insert name and address of Expert agreed between the Parties or appointed pursuant to clause 49.1 of the Project Deed or the equivalent clause in each Relevant Agreement*](**Expert**)

Recitals

1. The background to the Project is set out in the Project Deed.
2. On [*#insert*], the Parties agreed that the matter described in Schedule 1 be determined by an expert appointed under clause [*#insert relevant clause reference*] of the Relevant Agreement.
3. In accordance with clause [*#insert relevant clause reference*] of the Relevant Agreement, the Expert has been appointed to determine the Matter in accordance with the process set out in this Agreement.

Operative provisions

# Definitions

## Project Deed definitions

Unless otherwise expressly defined, expressions used in this Agreement have the meanings given to them in or for the purposes of the Project Deed.

## Definitions

1. **Agreement** means this agreement and includes all schedules, exhibits, attachments and annexures to it.
2. **Code of Conduct** means the code of conduct set out in section 2 of Schedule 2.
3. **Matter** means a dispute under, arising out of, or in connection with the Relevant Agreement and referred to expert determination under clause [*#insert relevant clause reference*] of the Relevant Agreement as more particularly described in Schedule 1.
4. **Party** means [*#insert party names*].
5. **Party A** has the meaning given in section 3(a) of Schedule 2.
6. **Project Deed** means the document entitled "[##]" between the State and Project Co dated [# *insert date*].
7. **Relevant Agreement** means[*#insert the relevant Project Document under which the Matter arose*].
8. **Rules** means the "Rules for Expert Determination Process" set out in Schedule 2.
9. **Schedule of Fees and Disbursements** is contained in Schedule 3.

## Interpretation

In this Agreement:

### (**headings**): headings and subheadings (including those of the type in this paragraph) are for convenience only and do not affect interpretation;

### (**number and gender**): a word importing the singular includes the plural and vice versa, and a word indicating a gender includes every other gender;

### (**Agreement and Schedule references**): a reference to:

#### a party, clause, Schedule, Annexure or Attachment is a reference to a party, clause, Schedule, Annexure or Attachment of or to this Agreement; and

#### a section, table, item or part is a reference to a section, table, item or part of the Schedule or the PSDR (as applicable) in which they are located,

#### unless expressly provided otherwise;

### (**Appendix**): a reference to an Appendix is a reference to an Appendix of the PSDR;

### (**Agreement as amended**): a reference to this Agreement, a Project Document, or to any other deed, agreement, document or instrument means a reference to this Agreement, such Project Document, or other deed, agreement, document or instrument as amended, novated, supplemented, varied or replaced from time to time;

### (**party**): a reference to a party includes that party's legal representatives, trustees, executors, administrators, successors and permitted substitutes and assigns, including any persons taking part by way of novation and, in the case of a trustee, includes a substituted or additional trustee;

### (**person**): a reference to a person includes an individual, the estate of an individual, a corporation, a body corporate, an Authority, an association or a joint venture (whether incorporated or unincorporated), a partnership, an Entity and a trust (including a trustee);

### (**replacement person**): a reference to a person appointed under this Agreement or any other Project Document includes that person's replacement or delegate appointed in accordance with this Agreement or other Project Document (as applicable);

### (**Standards**): unless otherwise expressly stated, a reference to a Standard includes that Standard as amended or updated from time to time;

### (**legislation**): a reference to legislation includes its delegated legislation and a reference to such legislation or delegated legislation or a provision of either includes:

#### all ordinances, by-laws, regulations of and other statutory instruments (however described) issued under the legislation or delegated legislation; and

#### consolidations, amendments, re‑enactments and replacements;

### (**definitions**): if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning;

### (**includes**): "include", "includes" and "including" will be read as if followed by the phrase "(without limitation)";

### (**"or"**): the meaning of "or" will be that of the inclusive, being one, some or all of a number of possibilities;

### (**information**): a reference to information includes information, representations, statements, data, samples, calculations, assumptions, deductions, determinations, drawings, design specifications, models, plans and other documents in all forms including the electronic form in which it was generated;

### (**"$"**): a reference to "$", AUD or dollar is to Australian currency;

### (**Business Day**): if the day on or by which anything is to be done under this Agreement is not a Business Day, that thing must be done no later than the next Business Day;

### (**time**):a reference to time is a reference to time in [Melbourne, Victoria, / Sydney, New South Wales,] Australia;

### (**rights**): a reference to a right includes any benefit, remedy, function, discretion, authority or power;

### (**obligations and liabilities**): a reference to an obligation or a liability assumed by, or a right conferred on, two or more persons binds or benefits them jointly and severally;

### (**absolute discretion**): unless the State or the State Representative is expressly required under this Agreement to act reasonably in exercising a power, right or remedy, the State can exercise any power, right or remedy in its absolute and unfettered discretion and the State has no obligation to do so;

### (**"may"**): without limiting clause 1.3(t), unless the State or the State Representative is expressly required under a State Project Document to act reasonably in exercising a power, right or remedy, the term "may", when used in the context of a power, right or remedy exercisable by the State, means that the State can exercise that power, right or remedy in its absolute and unfettered discretion and the State has no obligation to do so;

### (**replacement Authorities**): where there is a reference to an Authority, institute, association or other body referred to in this Agreement which:

#### is reconstituted, renamed or replaced or if its powers or functions are transferred to, or assumed by, another entity, this Agreement is deemed to refer to that other entity; or

#### ceases to exist, this Agreement is deemed to refer to the new entity (if any) which serves substantially the same purpose or object as the former entity; and

### (**no bias against drafter**): each provision will be interpreted without disadvantage to the party who (or whose representative) drafted or proposed that provision.

# Appointment of Expert

### (**Parties to appoint Expert**): The Parties appoint the Expert to determine the Matter in the manner and within the times set out in this Agreement and the Expert accepts the appointment on the basis set out in this Agreement.

### (**Agreement of Conditions**): The Parties agree that:

#### the Expert will act as an expert and not as an arbitrator;

#### neither the determination of the Matter, nor the process required by this Agreement is an arbitration and any conference conducted during the determination is not a hearing conducted under any legislation or rules relating to any form of arbitration;

#### the rules of evidence do not apply to the determination; and

#### the Expert must conduct the determination of the Matter in accordance with the Rules including the Code of Conduct.

### (**Independence and bias**): If, at any time during the determination, the Expert becomes aware of circumstances that might reasonably be considered to adversely affect the Expert's capacity to act independently or impartially, the Expert must inform the Parties immediately and, unless the Parties agree otherwise, terminate this Agreement.

# Confidentiality

### (**Confidential**): All proceedings and submissions relating to the determination (including the fact that any step in the determination is occurring), and all documents prepared for the purposes of the determination (including the Expert's determination), must be kept confidential.

### (**No divulging**): No such proceedings, submissions or documents, nor any other information relating to or arising out of the determination, may be divulged to any person, except with the prior written consent of both Parties or as may be required by Law, for the purpose of subsequent arbitration or to the extent necessary to give effect to or enforce the Expert's determination.

# Costs and fees

### (**Parties joint and severally liable**): As between the Parties and the Expert, the Parties are jointly and severally liable for the payment of the Expert's fees and disbursements, calculated in accordance with the Schedule of Fees and Disbursements.

### (**Calculation of costs and fees**): The Parties agree, subject to the terms of the Relevant Agreement, as between themselves that:

#### they will each pay one half of the Expert’s fees and disbursements, calculated in accordance with the Schedule of Fees and Disbursements; and

#### they will each bear their own costs of and incidental to the preparation of this Agreement and their participation in the determination.

# Exclusion of liability and indemnity

Except in the case of fraud, the Expert will not be liable to either Party for any act or omission by the Expert in the performance or purported performance of this Agreement. The Parties jointly and severally indemnify the Expert against all Claims or Liability in connection with any act or omission by the Expert (except fraud) in the performance or purported performance by the Expert of the terms of this Agreement.

# Co-operation of the Parties

Each Party agrees to take part in the determination in good faith and to comply with the reasonable requests and directions of the Expert in relation to the conduct of the determination.

# Governing Law and jurisdiction

### (**Governing Law**): This Agreement is governed by, and must be construed according to, the Laws of [Victoria / New South Wales], Australia.

### (**Jurisdiction**): Each Party irrevocably submits to the non‑exclusive jurisdiction of the courts of [Victoria / New South Wales], and the courts competent to determine appeals from the courts of [Victoria / New South Wales], with respect to any proceedings which may be brought in connection with this Agreement.

# Entire agreement

This Agreement:

### (**entire understanding**): embodies the entire terms agreed between the parties about its subject matter; and

### (**prior agreements**): supersedes any prior agreement of the parties about its subject matter.

# Further acts and documents

1. Each party must promptly do all further acts and execute and deliver all further documents required by Law or reasonably requested by the other party (in form and content reasonably satisfactory to that party) to give effect to this Agreement.

# Survival of certain provisions

### (**Surviving clauses**): The parties agree that:

#### clauses 3, 4, 5, 7 and this clause 10; and

#### any other provisions of this Agreement which, expressly or by implication from their nature, are intended to survive rescission, termination or expiration of this Agreement,

#### will survive the rescission, termination or expiration of this Agreement.

### (**Interpretation**): No provision of this Agreement which is expressed to survive the rescission, termination or expiration of this Agreement will prevent any other provision of this Agreement, as a matter of interpretation, also surviving the rescission, termination or expiration of this Agreement.

# Waiver

### (**Writing**): Other than where the waiver is already given expressly in the terms of this Agreement, a waiver that may be given by a party under this Agreement is only effective and binding on that party if it is given or confirmed in writing by that party.

### (**No waiver**): A failure to exercise or enforce, a delay in the exercise or enforcement of or the partial exercise or enforcement of a right provided by Law or under this Agreement by a party does not preclude, or operate as a waiver of, the exercise or enforcement, or further exercise or enforcement, of that or any other right provided by Law or under this Agreement.

### (**No waiver of another breach**): No waiver of a breach of a term of this Agreement operates as a waiver of another breach of that term or of a breach of any other term of this Agreement.

# Amendments

1. Unless otherwise expressly provided in this Agreement, this Agreement may only be amended by another document executed by or on behalf of each party.

# Expenses

Unless otherwise expressly provided in this Agreement, each party must pay its own costs and expenses in connection with negotiating, preparing, executing and performing this Agreement.

***[Note: GST clause to be inserted prior to execution.]***

# Severance

1. If, at any time, a provision of this Agreement is or becomes illegal, invalid or unenforceable in any respect under the Law of any jurisdiction, that will not affect or impair the legality, validity or enforceability of:

### (**provisions**): any other provision of this Agreement; or

### (**other jurisdictions**): that provision under the Law of any other jurisdiction.

# Counterparts

### (**Execution in counterparts**): This document may be executed in any number of counterparts or copies, each of which may be executed by physical signature in wet ink or electronically (whether in whole or part). A party who has executed a counterpart of this document may exchange it with another party (the **Recipient**) by:

#### emailing a copy of the executed counterpart to the Recipient; or

#### utilising an electronic platform (including DocuSign) to circulate the executed counterpart,

1. and will be taken to have adequately identified themselves by so emailing the copy to the Recipient or utilising the electronic platform.

### (**Consent**): Each party consents to signatories and parties executing this document by electronic means and to identifying themselves in the manner specified in this clause.

### (**Counterparts constitute an original**): Each counterpart constitutes an original (whether kept in electronic or paper form), all of which together constitute one instrument as if the signatures (or other execution markings) on the counterparts or copies were on a single physical copy of this document in paper form. Without limiting the foregoing, if any of the signatures or other markings on behalf of one party are on different counterparts or copies of this document, this shall be taken to be, and have the same effect as, signatures on the same counterpart and on a single copy of this document.

1. — The Matter

***[Note: Description of matter to be inserted.]***

1. — Rules for Expert Determination Process
   1. Commencement

The expert determination process begins when the Expert accepts an appointment to determine the Matter in accordance with these Rules including the Code of Conduct.

* 1. Code of Conduct
     + 1. The function of the Expert is to make a determination of the Matter in accordance with the Relevant Agreement and the Expert Determination Agreement, including these Rules and the Code of Conduct.
       2. The Expert must receive the written submissions and responses of the Parties in accordance with the procedures specified in these Rules and may require further information or documentation from the Parties which is reasonably necessary to determine the Matter.
       3. The Expert must decide whether a conference is necessary to receive further information. The Expert must inform the Parties of the subject matter of any conference and may hear representations only on those matters during any such conference.
       4. The Expert must disclose to both Parties all information and documents received.
       5. If a Party fails to make a written submission, the Expert may continue with the process.
       6. Subject to section 4 of these Rules in relation to conferences, meetings and discussions with the Expert must only take place in the presence of both Parties.
  2. Written Submissions
     + 1. Within 5 Business Days after the date this expert determination process begins, the Party who gave notice under clause *[# insert clause*] of the Relevant Agreement (**Party A**) must give the other Party and the Expert a written statement of the Matter referred for Expert determination, any agreed statement of facts and a written submission on the Matter in support of Party A's contentions.
       2. Within 5 Business Days after the statement in section 3(a) is served, the other Party must give Party A and the Expert a written response to Party A's submissions.
       3. If the Expert considers it appropriate, Party A may reply in writing to the other Party's response in section 3(b) within the time allowed by the Expert.
       4. If the Expert decides further information or documentation is required for the determination of the Matter, the Expert may direct one or more Parties to provide such further submissions, information or documents as the Expert may require.
       5. The Expert must disclose to both Parties all information and documents received.
       6. If a Party fails to make a written submission, the Expert may continue with the process.
  3. Conference
     + 1. The Expert may, if he or she thinks appropriate, call a conference of the Parties. Unless the Parties agree otherwise, the conference will be held in Melbourne, Australia.
       2. At least 5 Business Days before the conference, the Expert must notify the Parties of the date, venue and agenda for the conference.
       3. The Parties must appear at the conference and may make submissions on the subject matter of the conference. If a Party fails to appear at a conference of which that Party had been notified under section 4(b), the Expert and the other Party may nevertheless proceed with the conference and the absence of that Party will not terminate or discontinue the expert determination process.
       4. The Parties:
          1. may be accompanied at a conference by legal or other advisers; and
          2. will be bound by any procedural directions given by the Expert in relation to the expert determination process.
       5. The conference must be held in private.
       6. If required by any Party, transcripts of the conference proceedings must be taken and made available to the Expert and the Parties.
  4. General
     + 1. In making a determination or calling or holding a conference, the Expert must proceed in accordance with the Relevant Agreement, this Agreement and these Rules.
       2. Subject to section 4(c), meetings and discussions with the Expert must only take place in the presence of both Parties.
       3. Without limiting clause 2(c) of this Agreement, the Expert must:
          1. inform the Parties of:

any relationship or interest with the Parties or their respective Associates;

any interest the Expert has in the matters in dispute; and

any circumstance which might reasonably be considered to adversely affect the Expert's capacity to act independently or impartially,

immediately upon becoming aware of any such circumstances; and

* + - * 1. upon making any disclosure under this section 5(c), unless and until the Parties agree otherwise, terminate the proceedings.
  1. The Determination
     + 1. As soon as possible after receipt of the submissions or after any conference and, in any event not later than 22 Business Days after the Expert's acceptance of appointment, the Expert must:
          1. determine the Matter between the Parties; and
          2. notify the Parties of that determination.
       2. The determination of the Expert must:
          1. be in writing stating the Expert's determination and giving reasons;
          2. be made on the basis of the submissions (if any) of the Parties, the conference (if any) and the Expert's own expertise; and
          3. meet the requirements of the Relevant Agreement.
       3. To the extent permitted by Law, the Expert's determination will be final and binding on the Parties unless a notice of dissatisfaction is given in accordance with clause [*#insert relevant clause reference*] of the Relevant Agreement.
  2. Costs

Security for costs of the Expert must be deposited by both Parties at the commencement of the Expert determination process in accordance with any direction of the Expert.

* 1. Modification

These Rules may be modified only by agreement of the Parties and, if the Expert has been appointed, the Expert.

* 1. Proportionate Liability

Notwithstanding anything else, to the extent permissible by Law, the Expert will have no power to apply or to have regard to the provisions of any proportional liability legislation which might, in the absence of this provision, have applied to any dispute referred to Expert determination pursuant to clause [*#insert relevant clause reference*] of the Relevant Agreement.

1. — Schedule of Fees and Disbursements

***[Note: Expert's fees and disbursements to be inserted.]***

**Signed** as an agreement.

Each signatory executing this document (electronically or otherwise) intends by that execution to be bound by this document, and where the signatory has signed as an officer or attorney of a party, for that party to be bound by this document.

***[Note: Execution blocks to be inserted.]***

**State**

[**##**]

**Project Co**

[**##**]

**Expert**

[**##**]